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No. 88-1770

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner,
v.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Where an employer has long maintained a collectively bargained program of benefits for former employees which treats older employees more favorably than younger employees, may a court dissect the total program into parts and hold that one part, isolated from the remainder, discriminates against older employees under § 4(a)(1) of the Age Discrimination in Employment Act of 1967 (ADEA).

2. Whether a plan that exists and pays benefits fails to qualify as a "bona fide employee benefit plan" within the meaning of § 4(f)(2) of the ADEA because it lacks age-related cost factors; this same question is now pending before the Court in *Public Employees Retirement System v. Betts*, No. 88-389.

3. Whether an employer whose conduct at the time was not contrary to the law as then pronounced and applied by other federal courts may be held in "willful" violation of the ADEA.

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council (EEAC), with the written consent of the parties, respectfully submits this brief amicus curiae in support of the petition for a writ of certiorari filed in this case by Westinghouse Electric Company. The written consents of all parties have been filed with the Clerk of this Court. The brief urges reversal of the decision below.

INTEREST OF THE AMICUS CURIAE

EEAC is a nationwide association of employers and trade associations organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership comprises a

broad segment of the business community. The Council's governing body is a Board of Directors composed of experts in the field of equal employment opportunity. Their combined experience gives the Council an unmatched depth of knowledge of the practical as well as the legal aspects of equal employment policies and requirements. The members of EEAC are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members, and the constituents of its trade association members, are employers subject to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, and Title VII of the Civil Rights Act of 1984, as amended, 42 U.S.C. § 2000e *et seq.*, as well as other equal employment statutes and regulations. As employers, virtually all of EEAC's members and member constituencies maintain employee benefit plans for their employees over and above normal wages and salaries. Of these, a significant number are integrated benefit plans which provide a coordinated benefit "package," often the product of collective bargaining with employee representatives.

As potential respondents to charges of discrimination pursuant to the ADEA and Title VII, EEAC's members are interested in the extent to which individual elements of these benefit packages may be attacked as discriminatory notwithstanding the exception for bona fide benefit plans set forth in § 4(f)(2) of the ADEA.

Thus, the issues presented in the petition are extremely important to the nationwide constituency which EEAC represents. In this case, a collective bargaining agreement with the Union provided that

eligible employees had the option of receiving one of two post-employment benefits: immediate retirement benefits or severance and deferred retirement benefits. The court below held that eligible employees should have received both benefits and that denial of severance pay to persons who elected to receive immediate retirement benefits violated the ADEA, even "accepting Westinghouse's contention that the value of early retirement benefits is actuarially greater than or equal to the value of [severance benefits] plus a deferred pension. . . ." Pet. App. 16a.[1]

Moreover, the Third Circuit held that the Westinghouse post-employment income system was not an "employee benefit plan" under § 4(f)(2) of the Act, 29 U.S.C. § 623(f)(2). Rather, the court isolated the severance portion of the system, labeled it a "fringe benefit," and concluded it was not an integral component of a comprehensive employee benefits system. *Id.* at 26a.

EEAC's members are concerned about the potential effect of the Third Circuit's holding on innumerable coordinated employee benefit plans. In many contexts, and for many years, EEAC members have sought to provide for their employees integrated packages of fringe benefits designed to provide for their needs over and above wages or salary and to be consistent with the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.* Many of these employers have planned to provide post-employment income, particularly in the event of a plant closing, to guarantee their longest-

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[1] "Pet. App." references are to the appendix to Westinghouse's petition for a writ of certiorari.

working employees a continual stream of income until death as well as a "safety net" in the event of involuntary termination without fault.

In these situations, the responsible employer will attempt to provide benefits to the greatest number of employees, with due regard to the amount of available funds. Under the decision below, however, a benefit can be held to be age-discriminatory merely because older employees receive this continued income as part of a retirement program rather than through a severance package designed for workers not eligible for retirement. However, if older workers must receive the greatest benefits under each portion of a package dissected into its component parts, a considerable number of established, and often collectively bargained, benefit plans will fail, and in many cases, some of the benefits will be eliminated because of greatly increased, and unanticipated, costs.

Because of its interest in the application of the nation's civil rights laws, EEAC has filed over 250 briefs as *amicus curiae* in cases before the United States Supreme Court, the United States Circuit Courts of Appeals and various state supreme courts. As part of this amicus activity, EEAC has participated in several cases involving application of the ADEA to retirement and severance pay plans, including *Public Employees Retirement System v. Betts*, No. 88-389 (U.S. argued March 28, 1989); *EEOC v. Borden's, Inc.*, 724 F.2d 1390 (9th Cir. 1984); *EEOC v. Westinghouse Electric Corp.*, 725 F.2d 211 (3d Cir. 1983), *cert. denied*, 469 U.S. 820 (1984); and *Abenate and Equal Employment Opportunity Commission v. Fulflex, Inc.*, Nos. 89-1179, 89-1180 (1st

Cir.) (Severance pay offset by present value of lifetime pension benefit).[2]

STATEMENT OF THE CASE

The facts of this complicated case are described more fully in Westinghouse's petition and in the opinion of the Third Circuit. Set out below, however, are the holdings of the court below that highlight the general importance of this case beyond the interests of the particular parties.

This case does *not* involve an employer flush with cash in the midst of an economic boom. Rather, as occurred all too frequently in the past decade, Westinghouse was faced with the necessity of closing a plant and laying off employees. The possibility of economic extremis, however, had been anticipated twenty years earlier and provided for through a series of agreements between Westinghouse and the union representing its employees.

Through this ongoing series of agreements, the company and union adopted and refined a post-employment income system for a large number of employees—those eligible for immediate pension payments, severance pay, or both. Beginning in 1960, these agreements provided that those eligible for retirement would receive their post-employment compensation through the retirement system. Those not

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[2] Furthermore, a number of the other cases in which EEAC has participated have involved the proper interpretation of the ADEA. *See, e.g., Harbison-Walker Refractories v. Brieck, cert. dismissed*, 109 S. Ct. 546 (1988); *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985); *Lorillard v. Pons*, 434 U.S. 575 (1978); *Shell Oil Co. v. Dartt*, 434 U.S. 99 (1977). *See also McLaughlin v. Richland Shoe Co.*, 108 S.Ct. 1677 (1988) (standard for willful violations under the FLSA, Equal Pay Act and ADEA).

eligible to participate in the retirement system would receive their post-employment payments by way of severance benefits. Over time, the retirement-eligible pool of employees was expanded, and the age and service requirements applicable to the plant closure situation were reduced.

Initially, those eligible for retirement did not have the choice of receiving severance pay as an alternative. In 1982, the program was revised to give those eligible for early retirement the *option* of receiving either immediate retirement benefits or a lump-sum payment of separation benefits. (Pet. App. 12a.)

Those who chose not to sever their relationship with the company would receive additional pension and insurance benefits including: a lifetime pension; a supplemental monthly payment for each year of credited service until eligible for Social Security payments; the opportunity to provide continued benefits to a spouse or other person in the event of death; continuation of life insurance; continuation of medical coverage until eligible for Medicare; and continuation of dependent insurance. (Pet. App. 12a-13a.)

The Third Circuit held that even accepting Westinghouse's contention that the value of early retirement benefits is greater than or equal to the value of severance pay plus a deferred pension, because pension eligibility was the determinative factor, retirement-eligible employees were treated less fairly "based on age" than were workers who received severance pay plus deferred pensions. (Pet. App. 16a-17a.)[3]

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[3] The Third Circuit noted that its holding on this point was contrary to *Parker v. Federal Nat'l Mortgage Ass'n.*, 741

Interestingly, when Westinghouse later raised the defense that its post-employment compensation program was based on age-related cost factors, the Third Circuit took the opposite tack and stated that "other courts have recognized that a plan based on length of service and salary is not necessarily based on age." (*Id.* at 28a-29a and cases cited.)

Further, although retirees received these post-employment benefits through the retirement plan, the Third Circuit rejected Westinghouse's arguments that this was a comprehensive and integrated benefits program. (*Id.* at 19a-24a.) Instead, the court made the following distinction:

> Under those plans, severance pay and pension benefits have distinctly different purposes. Severance pay was a short-term fringe benefit, to provide financial assistance during the adjustment period immediately following layoff; pension benefits were long-term retirement benefits. The district court concluded that pension benefits are not a substitute for severance pay. We agree.

Id. at 20a. Thus, because the severance benefits were not merged into the pension plan, the Third Circuit held that Westinghouse's system was not an "employee benefit plan" protected by Section 4(f)(2) of the Act. *Id.* at 20a-21a.

The Court then remanded the case to the district court to determine whether Westinghouse had committed a "willful" violation of the statute. (Pet. App.

F.2d 975 (7th Cir. 1984) ("To the extent that the court [in *Parker*] held that an option policy like Westinghouse's does not violate the ADEA, *we decline to follow it.*"). Pet. App. 24a-25a) (emphasis added).

29a-36a.) If willfulness is found, Westinghouse faces double damages under the ADEA.

REASONS FOR GRANTING THE WRIT

BECAUSE THE THIRD CIRCUIT'S ANALYSIS IS CONTRARY TO THE ADEA, ERISA AND DECISIONS IN OTHER CIRCUITS, BENEFITS PLANNERS NEED THIS COURT'S GUIDANCE TO RESOLVE THE CONFUSION CREATED IN THIS CASE. WITHOUT SUCH GUIDANCE, MANY POST-EMPLOYMENT INCOME PLANS DESIGNED TO PROVIDE AN INCOME STREAM TO THE LARGEST POSSIBLE NUMBER OF FORMER EMPLOYEES WILL BE THREATENED.

A. By Requiring That Retirement-Eligible Persons Receive Any Post-Employment Payments Made To Others, The Decision Below Is At Odds With Common Practice And Jeopardizes Existing Levels Of Early Retirement And Severance Payments

Post-retirement systems like the one in this case are common in American industry. Among the Fortune 200 companies—most of which are EEAC's members—are numerous companies from various industries (including steel, electronics, auto, oil, rubber, telecommunications, canning, and meatpacking) that are directly affected by the decision below. This effect extends far beyond the Third Circuit, as the Equal Employment Opportunity Commission, private plaintiffs and the American Association of Retired Persons (AARP) are using the decision below to bring or support ADEA actions in other post-employment cases as well.[4]

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[4] *See, e.g.*, the briefs of the EEOC and AARP in *Abenate and EEOC v. Fulflex, Inc.*, Nos. 89-1179 and 89-1180 (1st Cir.); and EEOC Summary of Age Discrimination Lawsuits Filed in Fiscal Year 1988, No. 251 Daily Labor Report (BNA) at D-1 to D-5 (December 30, 1988).

A distinction that often is missed in these cases is that the post-employment system *does not jeopardize vested retirement benefits already earned.* Those benefits are protected by ERISA and cannot be taken away. Rather, these cases involve employer policies designed to protect employees from the economic impact of layoffs where jobs are being consolidated or eliminated. They involve employer policies that go beyond any legal requirement and provide a post-employment flow of income to those employees affected by the business downturn. Both special early retirement pensions and severance payments are designed to protect employees against *ad hoc* contingencies which may or may not occur, such as plant closings or reductions in force.

Many companies, like Westinghouse, establish their post-employment retirement and severance policies at the same time and maintain them on an ongoing basis. Others are prompted by unforeseen economic downturns to establish severance plans for persons not previously covered, or to extend coverage where appropriate. Often, when an industry experiences a downturn and layoffs are necessary, economic circumstances make it exceedingly difficult for many employers to pay any and all severance payments to those who have previously been covered by enhanced post-employment pension benefits.

Under the view of the Third Circuit and the EEOC, those extra payments also must be made to retirement-eligible workers who have already been provided an equivalent or more valuable post-employment income package. This approach poses a great risk for the continued use of such programs at their present level. As one court has explained:

> . . . EEOC's position causes no little concern for the plight of employees subject to layoff in the future. Since layoffs are usually the result of employers cost-cutting measures in years of economic decline, [*an employer*] *may simply decide that it cannot afford both the present rate of pensions plus severance and terminate all severance pay.*

EEOC v. USX Corp., 10 EBC 2341, 2350 n. 15 (E.D. Pa. 1989) (emphasis added).

Given the uncertainty created by the decision below, plus the possibility that such programs may be found to be a "willful" violation subject to liquidated double damages (Pet. App. 29a-36a), review by this Court is essential to provide much-needed guidance for employers and agency officials who may prosecute them.

B. The Effect Of The Decision Below Will Be Widespread, As Integrated Benefit Plans Permitted By ERISA Are A Common Method Of Providing Post-Employment Income Benefits.

Most employers, either unilaterally or through collective bargaining, offer their employees benefits in addition to wages or salary. These valuable benefits can include life and health insurance, disability income, sick leave, paid vacations, and post-employment income. Perhaps the most common benefit is a retirement pension, a lifetime income generally provided to employees who have satisfied minimum service requirements and attained retirement age.[5] In

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[5] According to a recent survey of workers over 40, 77% of employees surveyed said that they were covered by a pension plan offered by their current employer. American Association of Retired Persons, *Work and Retirement: Employees Over 40 and Their Views* at 13 (1986).

addition, many employers have elected to provide a lesser benefit, known as "separation" or "severance" pay, to employees who lack the eligibility requirements for a pension.

Westinghouse agreed, through the collective bargaining process, to provide pension benefits for eligible employees and severance pay to those who could not qualify for a pension. This design is fairly typical. A full forty percent of collectively bargained plans which restrict receipt of benefits deny severance pay to pension-eligible employees. *See Basic Patterns: Income Maintenance, Collective Bargaining Negotiations and Contracts* (BNA) No. 1144 at 53:4 (April 6, 1989).

Significantly, Congress has integrated pension and severance benefits for federal employees. Retirement-eligible civil service employees do not receive severance pay, 5 U.S.C. § 5595(a)(2)(B)(iv),[6] nor do members of the armed forces. 10 U.S.C. § 1186 (voluntary retirement); 10 U.S.C. § 1174(e) (involuntary discharge or release). Similarly, severance payments received are deducted from pension payments to a regular warrant officer of the Coast Guard, 14 U.S.C. § 286a(d), or an officer of the National Oceanic and Atmospheric Administration. 33 U.S.C. § 853h(e).

The purpose underlying this practice is self-evident. Employers have a limited amount of funds to provide post-employment income benefits. Quite naturally, they wish to allocate more resources to

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[6] Importantly, 5 U.S.C. § 5595, Pub.L. 90-83 (September 11, 1967), 81 Stat. 201, was enacted by the same session of Congress that enacted the ADEA, Pub.L. 90-202 (December 15, 1967).

employees with longer service to the company, yet at the same time provide some benefit to those with less service. Pension payments and severance pay serve essentially the same function—to provide income to employees after employment has terminated. Thus, in an integrated benefit plan, every employee earns credits towards some form of income replacement at termination. If the employee remains with the company long enough to attain the minimum age and service requirements for a pension, the post-employment income benefit takes the form of a lifetime income through the retirement system. If not, the employee is only entitled to a severance payment, which, by definition, cannot be paid through the retirement system.

Integration of pensions with other benefits is a well-recognized method of fairly providing post-employment income to employees. As the Supreme Court observed in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), holding that ERISA does not prohibit the deduction of workers' compensation payments from pension benefits, "integration" is:

> a calculation practice under which benefit levels are determined by combining pension funds with other income streams available to the retired employees. Through integration, each income stream contributes for calculation purposes to the total benefit pool to be distributed to all the retired employees, even if the nonpension funds are available only to a subgroup of the employees.

451 U.S. at 514. Numerous federal courts have upheld various forms of benefit integration under ERISA.[7]

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[7] *See, e.g., Spitzler v. New York Post Corporation*, 620 F.2d 19 (2d Cir. 1980) (deduction of present value of pension

C. The Decision Below Is At Odds With The Decisions Of Other Courts And Is Based Upon A Fundamental Misconception That Isolates Severance Benefits From An Integrated Post-Employment Income System.

In this case, Westinghouse negotiated with the union a comprehensive, post-employment compensation system which provided that retirement-eligible individuals would receive their future benefits through the retirement system. But it also attempted to provide some post-employment severance income to those employees who were not eligible for retirement.

Those severance payments, of course, could not be paid through the retirement system, nor would there be any reason to establish an ongoing relationship with former employees who were laid off with no prospect for future employment. Thus, those employees received severance pay in the form of a lump sum payment. Retirement-eligible employees had the option of receiving their post-employment income either through the retirement system (along with other valuable benefits) or through a lump sum payment for severance pay. The fundamental flaw in the Third Circuit's decision is that it myopically viewed the severance pay plan as an independent benefit. Because that approach ignored the realities

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account from severance pay calculation does not violate ERISA); *Leary v. Western Union Telegraph Company*, 570 F. Supp. 1384 (S.D.N.Y. 1983) (same). *See also Vintilla v. U.S. Steel Corp. Plan for Employee Pension Benefits*, 606 F. Supp. 640 (W.D. Pa. 1985), *aff'd without opinion*, 782 F.2d 1033 (3d Cir.), *cert. denied*, 475 U.S. 1141 (1986) (pension plan did not violate ERISA by setting off severance benefits paid pursuant to Venezuelan law).

of employee benefit plans, it should be reversed by this Court.

The Third Circuit refused to consider any possibility that pension and severance benefits were part of a single integrated benefit package. The entire decision turns on the court's unsupported conclusion that:

> [Plaintiffs] had vested rights to their retirement benefits independent of Westinghouse's policy on severance pay. It is therefore inappropriate to characterize retirement benefits as a more valuable substitute for severance pay. Any right to severance pay was in addition to, not a part of, the preexisting vested right to retirement benefits.

(Pet. App. 16a-17a). The clear language of the statute, however, does not require such an interpretation. Instead, where a challenged policy is not a "free standing element," it should not be evaluated in a vacuum, but in the context of the complete policy of which it is a part. *See Arnold v. Postal Service*, 863 F.2d 994 (D.C. Cir. 1988) (Postal Service policy requiring transfer of inspectors with greatest seniority to major metropolitan offices must be viewed in light of entire transfer policy and thus did not violate ADEA).

Moreover, the court offered neither explanation nor justification for its startling opinion that the fact that retirement payments had vested required the payment of severance pay to pension-eligible persons who were laid off. Whether or not employees had a "vested" right to retirement benefits is irrelevant to a determination of whether those benefits were offered in coordination with an integrated benefit package. Even if such benefits were "vested" under

the provisions of ERISA, it does not follow that these benefits must be viewed in a vacuum, or that the employee also is entitled to a similar post-employment benefit paid to employees who are not yet eligible for retirement. Accordingly, the court's statement that the right to severance pay was not a part of a preexisting right to pension benefits does not characterize accurately the nature of the beenfits offered.

Any employer which contemplates providing one or more fringe benefits to its employees must necessarily consider the benefits, if any, already in place, and the cost of those benefits, together with the cost of any new benefits under consideration. In order, fairly and efficiently, to provide maximum benefits at reasonable cost, a responsible employer will ensure that benefits with similar purposes coordinate with and complement each other, instead of overlapping in some cases and failing to provide adequate benefits in others. This approach creates an integrated "benefit package" which serves the entire work force.

As noted more fully in part B above, the "integrated benefit plan" is well established both in fact and in law. Nevertheless, the Third Circuit inexplicably chose to ignore this reality. In fact, the Third Circuit's decision conflicts with a number of decisions in other circuits involving an interrelationship between pensions and severance pay. Indeed, the court below acknowledged this split and refused to follow the Seventh Circuit's decison in *Parker v. Federal National Mortgage Association*, 741 F.2d 975 (7th Cir. 1984). *See* footnote 3, above. In another circuit split, the Fourth Circuit upheld a plan requiring deferral of pension benefits during receipt of

severance pay in *Britt v. E.I. DuPont de Nemours & Co.*, 768 F.2d 593 (4th Cir. 1985). Several district courts have approved similar structures. *See, e.g., Khan v. Grotnes Metalforming Systems, Inc.*, 679 F. Supp. 751 (N.D. Ill. 1988) (severance pay deducted from pension benefits); *EEOC v. Firestone Tire & Rubber Co.*, 650 F. Supp. 1561 (W.D. Tenn. 1987) ("severance" award was actually minimum pension distribution).[8] In fact, one district court in the Third Circuit has observed that it would have upheld a plan coordinating pension and severance pay had it not felt obligated to follow the Third Circuit. *See EEOC v. USX Corporation*, 10 EBC 2341, 2347 (E.D. Pa. 1989).

In all of these cases, the employer provided a post-employment income payment system designed to substitute for wages earned through working. The payment was made either through the pension system (for retirement-eligible employees) or by way of severance pay for others. The validity of post-employment income programs has been jeopardized by the decision below. Millions of dollars of benefits are at stake. Thus, we strongly urge the Court to review this case and clarify issues of utmost importance to employees, employers and the enforcement of the ADEA.

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[8] *Cf. EEOC v. Curtiss-Wright Corp.*, 40 FEP Cases 666 (D.N.J. 1982) (while pension-eligible employees cannot be denied severance pay, pension should only be payable after severance pay is exhausted).

CONCLUSION

For the foregoing reasons and the reasons set forth in the petition, the amicus, EEAC, respectfully urges the Court to grant the petition herein on all three issues raised in Westinghouse's petition.

Respectfully submitted,

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